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Filing date:

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91212477
Party	Defendant GFA Brands, Inc.
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Submission	Testimony For Defendant
Filer's Name	Johanna M. Wilbert
Filer's e-mail	johanna.wilbert@quarles.com, deena.rafinski@quarles.com
Signature	/Johanna M. Wilbert/
Date	01/23/2015
Attachments	GFA's Notice of Filing of Sep. 19 2014 Certified Testimony Dep. Tr. and Exs. of Howard Seiferas.pdf(10286 bytes) 2014-09-19 SEIFERAS Howard Trial Testimony Tr. and Exs 13-14.pdf(2556378 bytes) 2014-09-19 SEIFERAS, Howard REDACTED Ex. 15.pdf(736473 bytes)

UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Application Serial No. 85/751,520: EARTH BALANCE Published for Opposition March 19, 2013

BALANCE BAR COMPANY,

Opposer,

Opposition No. 91212477

v.

GFA BRANDS, INC.,

Applicant.

APPLICANT'S NOTICE OF FILING OF CERTIFIED TRIAL TESTIMONY DEPOSITION TRANSCRIPT AND EXHIBITS OF HOWARD SEIFERAS

Pursuant to 37 C.F.R. § 2.125(c) and Rule 703.01(k) of the Trademark Trial and Appeal Board Manual of Procedure ("TBMP"), Applicant GFA Brands, Inc. hereby files with the Board, and notifies Opposer of the filing of, the certified testimony deposition transcript and accompanying exhibits of Howard Seiferas, whose testimony deposition was taken on September 19, 2014.

Pursuant to 37 C.F.R. §§ 2.125(e), 2.126(c), TBMP 703.01(p), and the Stipulated Protective Order, approved by the Board on February 20, 2014, the following testimony deposition exhibit has been designated as "Highly Confidential" and is being filed with the Board under seal, under separate cover: Exhibit No. 15.

/s/ Johanna M. Wilbert

David R. Cross Marta S. Levine Johanna M. Wilbert Andrea J. Fowler Quarles & Brady LLP 411 East Wisconsin Avenue Suite 2040

Milwaukee, Wisconsin 53202-4497

Telephone: (414) 277-5495 Facsimile: (414) 978-8942 Email: DRC@quarles.com

Email: marta.levine@quarles.com Email: johanna.wilbert@quarles.com Email: andrea.fowler@quarles.com Attorneys for Applicant GFA Brands, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2015, I served upon counsel of record the foregoing by causing the same to be delivered by U.S. mail and email to:

R. Glenn Schroeder Schroeder Law PC 110 Cooper Street #605 Babylon, New York 11702 gschroeder@schroederlawpc.com

Dated this 23rd day of January, 2015.

/s/ Johanna M. Wilbert

Johanna M. Wilbert Quarles & Brady LLP 411 E. Wisconsin Avenue Suite 2040 Milwaukee, WI 53202-4497

Phone: (414) 277-5000 Facsimile: (414) 978-8942 johanna.wilbert@quarles.com

Page 1

Deposition of Howard Seiferas
UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Application
Serial No. 85/751,520: EARTH BALANCE
Published for Opposition March 19, 2013

BALANCE BAR COMPANY,

Opposer,

v.

GFA BRANDS, INC.,

Applicant.

DEPOSITION OF: HOWARD SEIFERAS Friday, September 19, 2014

METROPOLITAN COURT REPORTING SERVICE, INC.

Certified Shorthand Reporters

PO Box 858

Maywood, New Jersey 07607

(201) 909-0666

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Page 2
             Deposition of Howard Seiferas
1
2
                  T R A N S C R I P T of Deposition
3
    Proceedings held in the above-entitled matter,
    taken by and before Adrian J. Febre, a
4
5
    Shorthand Reporter and Notary Public of the
    State of New Jersey, held at the offices of
6
7
    Metropolitan Court Reporting Services, 240
    West Passaic Street, Maywood, New Jersey
8
    07607, on Friday, September 19, 2014,
9
10
    commencing at 10:46 a.m.
11
12
13
14
            No copy of this Transcript may be
15
    considered Certified unless signed in ink by
    the Shorthand Reporter licensed by the State
16
17
    of New Jersey who recorded this matter.
18
    Facsimile may have been altered by means of
19
    electronic media.
20
21
22
23
24
    *** Transcript prepared in accordance to Rule
    NJ ADC 13:43-5.0 ***
25
```

```
Page 3
1
              Deposition of Howard Seiferas
2
3
                 APPEARANCES
4
5
         SCHROEDER LAW, P.C.
         BY: R. GLENN SCHROEDER, ESQ.
6
         110 Cooper Street #605
         Babylon, New York 11702
7
         Attorneys for the Opposer
8
         QUARLES & BRADY, LLP
9
         BY: DAVID R. CROSS, ESQ.
         411 East Wisconsin Avenue
         Milwaukee, Wisconsin 53202
10
         Attorneys for the Applicant
11
12
13
14
15
16
17
18
19
20
21
22
23
24
2.5
```

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		Page 4
1	Deposition of Howard Se	iferas
2	E X H I B I T S	
3	APPLICANT'S EXHIBITS	
4	EXHIBIT EXHIBIT	PAGE
	NUMBER DESCRIPTION	NUMBER
5		
	13 Photograph	7
6	14 Photograph	7
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7		
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9	I N D E X	
10	WITNESS - HOWARD SEIFERAS	
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	By Mr. Cross 5	
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15	INFORMATION AND/OR DOCUMENT	S PAGE
16	$N \circ n \in$	
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18		
	QUESTIONS MARKED FOR RULING	S
19	PAGE LINE / PAGE	LINE
20	None	
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23		
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Page 5
             Deposition of Howard Seiferas
1
2
         HOWARD SEIFERAS,
3
         115 West Century Road, Suite 260,
         Paramus, New Jersey 07652, having first
4
5
         been duly sworn, according to law,
         testified as follows:
6
7
8
9
    DIRECT EXAMINATION
    BY MR. CROSS:
10
11
         Q.
              What is your full name?
12
             Howard Brian Seiferas.
         Α.
13
         Q.
               How old a man are you?
14
               I am 60.
         Α.
15
         Q.
               Where do you work?
16
         Α.
                GFA Brands, Inc.
17
         Q.
                What is your current title?
18
         Α.
               SVP Sales Services and Logistics.
19
         Q.
               And SVP stands for senior vice
    president?
20
21
               That is correct.
         Α.
22
                What are your duties generally in
         Ο.
23
    that role?
24
         Α.
           I oversee the order to cash
25
    basically. So what that is is from the time
```

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```
Page 6
             Deposition of Howard Seiferas
1
    orders are placed, through the whole
2
    distribution network, and the customer service
3
    aspect of that as well.
4
5
         Q.
               Do you have any degrees past
6
    college?
7
                I have an MBA in finance.
         Α.
8
         Q.
                Do you have a college degree?
9
                I do also. That is a BBA in
         Α.
10
    finance.
                When did you get your Bachelor's
11
         Q.
12
   Degree?
13
        Α.
                1976.
14
         Ο.
                1976. How long have you been with
15
    GFA?
               Since 1977.
16
         Α.
17
         Q.
                So essentially right out of
18
    college?
                Yeah. I had a job in between,
19
        Α.
20
    yes.
            Okay. I want to take you back to
21
         Q.
22
    2005, that time period. Did GFA in that time
23
    period sell a fruit bar under the name Earth
    Balance?
24
25
        A. Yes, in 2005 is when we first
```

```
Page 7
1
             Deposition of Howard Seiferas
    started with that.
2
             What was your role with GFA in the
3
         Q.
    2005/2006 time period?
4
             I was Vice President of
5
    Operations, so many of the same duties that I
6
7
    have now but a little broader.
8
               How many employees did GFA have in
         Q .
    the 2005 to 2006 time period?
9
10
         A. Somewhere between ten and
    fourteen.
11
12
            Just for a sense of scale, how
         Ο.
13
    many does GFA have now ballpark?
14
               Over 700.
         Α.
15
                MR. CROSS: Let's have these
         marked as Exhibit 13 and Exhibit 14.
16
17
                (Whereupon, Applicant Exhibits 13
         and 14 were marked for identification by
18
19
         the Court Reporter.)
20
         Q. Taking Exhibit 13 first, can you
    tell us what that is please?
21
22
                (Whereupon, the Witness looked at
23
         the aforementioned exhibit.)
24
                This is the wrapper or the film
         Α.
25
    for the individual selling unit.
```

```
Page 8
             Deposition of Howard Seiferas
1
2
         Q.
                For the fruit bar product?
3
         Α.
                For the fruit bar product,
4
    correct.
5
         Q.
               Does Exhibit 13 accurately reflect
    what you recall the packaging to be for that
6
7
    product?
8
         Α.
                Yes.
9
                And Exhibit 14 what is that?
         Q.
10
                 (Whereupon, the Witness looked at
11
         the aforementioned exhibit.)
12
                This was the sales flier that we
13
    used for our presentation and to send to
14
    stores and buyers.
15
         Q.
             What is shown in the top maroon
    box?
16
17
                This package right here?
         Α.
18
         Q.
                Yes.
19
         Α.
                What that is is the selling caddie
20
    that would go in the store shelves, give us a
    bit of a banner for selling it. And we had
21
22
    individual selling units that consumers would
23
    buy from that caddie.
24
               Does Exhibit 14 accurately depict
    what you recall having seen as far as the
25
```

```
Page 9
             Deposition of Howard Seiferas
1
    Earth Balance fruit bar caddie is concerned?
2
3
         Α.
                Yes.
                MR. CROSS: Let's have this marked
4
5
         as the next exhibit.
                 (Whereupon, Applicant Exhibit 15
6
7
         was marked for identification by the
8
         Court Reporter.)
9
         Q.
             I'm going to show you what the
10
    Court Reporter has marked as Exhibit 15. Can
11
    you tell us what that is please?
12
                 (Whereupon, the Witness looked at
13
         the aforementioned exhibit.)
14
                This is a working agreement that
         Α.
15
    we had with our co-packer. I don't know if
16
    this one is signed. Yeah, we did not operate
17
    with contracts, per se, so we would use a
18
    letter of agreement.
19
               The co-packer's name is Gorge,
20
    G-O-R-G-E, Delights?
21
         Α.
            Yes.
22
                And this was an agreement relating
         Q.
23
    to what product?
                This is specifically for the Earth
24
         Α.
    Balance fruit bars.
25
```

```
Page 10
             Deposition of Howard Seiferas
1
2
         Q.
                This document is dated at the top
    March 19th, 2005. What was your role as far
3
    as keeping business records for GFA back in
4
5
    that time period?
                It was an unofficial role, but any
6
7
    documents that we had from any of our business
    opportunities I would scan and save on my
8
9
    computer, so I was sort of the custodian.
10
         0.
               And what did you do with Exhibit
    15?
11
12
                I did nothing with it other than
         Α.
13
    file it and preserve it.
14
            So it had been with your files
         Ο.
15
    since 2005?
16
                Absolutely, yes.
         Α.
17
                Who was responsible for actually
18
    printing out or getting the hard copy
19
    available for use in this case?
20
                I did. I was requested if I had
         Α.
    any documentation that would apply. So I was
21
22
    able to access my folder and reprint that.
23
         Q.
                Exhibit 15?
2.4
                Exhibit 15, correct.
         Α.
25
         Q.
               Do you recall seeing Exhibit 15
```

```
Page 11
             Deposition of Howard Seiferas
1
2
    back around the time it was prepared in March
    of 2005?
3
             No, I don't recall it
4
         Α.
    specifically, but I have it.
5
                This Exhibit 15 is dated March of
6
7
    2005. Approximately when did sales of the
8
    Earth Balance labeled fruit bars begin?
9
                Later on that year, probably
         Α.
10
    fall-ish, maybe the fourth quarter, end of
    third quarter, beginning of fourth quarter I
11
12
    would say.
13
         Ο.
               Was its launch immediate into full
    production and distribution?
14
15
         Α.
                No.
                What was the initial launch?
16
         0.
17
                The initial launch was in the
18
    western region for one specific distributor,
    and we did not expand at that point. We
19
20
    always would test a product.
21
               So this launch was essentially for
         Q.
22
    product testing?
23
         Α.
                Yes.
               Did the Earth Balance fruit bars
2.4
         Ο.
25
    ever get past the test rollout?
```

```
Page 12
             Deposition of Howard Seiferas
1
2
         Α.
                No.
                Why not?
3
         Q.
                It would be based on the sales and
4
         Α.
5
    evaluation of the sales potential. We did not
6
    feel that the sales were significant to
7
    justify additional rollout.
8
                Were you involved in the
         Q.
    discussions internally at GFA about whether
9
10
    additional production and distribution of the
    Earth Balance fruit bars should occur?
11
12
                Not in the direct decision, but
13
    discussions about it I was aware, yes.
14
                So it never went to full
         Ο.
15
    production rollout because the product did not
16
    appear as if it were going to succeeded; is
17
    that correct?
18
         Α.
                That is correct.
                Any feedback from the field at any
19
         Q.
20
    point about why it wasn't selling well?
21
                The feedback that I was aware of
         Α.
    was that the price point was too high, it was
22
23
    not a compelling item for the consumer at that
24
    price point.
25
         Q. It wasn't good enough to pay the
```

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Page 13 Deposition of Howard Seiferas 1 2 price that you wanted to get for it? 3 Α. Consumers were not willing to pay that much, you know, for a bar like that. 4 5 Q. Well, why didn't you just lower the price? 6 7 Α. The company was very particular about profit margins. If the margin was not 8 9 there and the sales potential was not there, 10 that item -- we would not continue selling that item. 11 12 Do you recall any other reasons Ο. 13 for discontinuing the fruit bar products that 14 were being sold under the Earth Balance name? 15 Α. No. 16 Do you recall approximately when 17 the decision was made to stop selling the 18 Earth Balance fruit bars? I would say that -- I know that we 19 Α. 20 stopped selling it in 2006 because of the lack of sales, and I know that we ended up 21 22 liquidating remaining inventory the beginning 23 of the following year 2007. 24 What do you mean by liquidating 25 remaining inventory?

```
Page 14
             Deposition of Howard Seiferas
1
2
                What we did is we donated to
         Α.
3
    America's Second Harvest the remaining
    inventory that we had in our possession.
4
5
         Q.
                Why didn't you just try to sell it
    into the market?
6
7
                At that point because of the shelf
         Α.
    life of the product, there was very little
8
    shelf life left, and our customers would not
9
10
    purchase something that does not have a
11
    certain amount of remaining shelf life.
12
                So you simply couldn't sell that
         0.
13
    remaining --
14
         Α.
                No.
15
         0.
                After the decision was made to
16
    stop selling the fruit bar because in the test
17
    period it appeared not to be a viable product,
18
    did the product get sold at any other point
19
    thereafter but under a different name?
20
         Α.
                No.
21
                Are you aware of a letter that had
22
    been sent by lawyers for the Balance Bar
23
    Company in July of 2006 to Bob Harris of GFA
    complaining about the use of Earth Balance in
24
25
    connection with the fruit bars?
```

```
Page 15
             Deposition of Howard Seiferas
1
2
                I am aware of that letter now.
         Α.
                                                  I
3
    have seen it in the last couple of months.
    But I was not aware of it prior to that.
4
5
                Now, taking you back again to the
6
    2005/2006 time period, were you aware or did
    you participate in any discussions concerning
7
    discontinuing the fruit bar product because of
8
    anything to do with trademark issues?
9
10
         Α.
                No.
11
         Q.
                Or a letter from a lawyer?
12
                No.
         Α.
13
         Q.
                If the fruit bar product had been
14
    profitable or shown signs of success, were
15
    there other marks available at GFA that it
    could have been sold under?
16
17
                We did market several brands, so
18
    theoretically we could have brought that
    product out with a different brand name, yes.
19
20
                And you didn't because?
         Q.
                There was no justification for
21
         Α.
22
    that based on lack of sales.
23
         Q.
                I have no further questions.
24
    Thank you.
25
                MR. SCHROEDER: Just give me a
```

```
Page 16
             Deposition of Howard Seiferas
1
2
         couple of minutes and then we will do
3
         some quick cross and then we can get on
         out of here.
4
                 (Whereupon, a brief recess was
5
         taken.)
6
7
8
    CROSS-EXAMINATION
    BY MR. SCHROEDER:
9
           Good morning. Thanks for coming
10
    in today. I have a few questions to ask and I
11
12
    will try to keep it organized here.
13
         Α.
                Very good.
14
                You mentioned just earlier that
         Ο.
15
    you believed the actual launch date of the
16
    product took place from the fourth quarter of
17
    2005; is that correct?
18
                I know it was 2005 for sure, and
    it was towards the end of the year.
19
20
               Over how long of a period was the
         Q.
    product actually sold, if you know?
21
22
                I can only tell you from that
23
    start point to the point where we get rid of
    the remaining inventory. I know that happened
24
25
    in early 2007. So I don't know if sales
```

```
Page 17
             Deposition of Howard Seiferas
1
    extended beyond 2006.
2
                But it would have been sold end of
3
         Q.
    2005 through 2006?
4
5
         Α.
                Yes.
                Now, you also mentioned earlier
6
7
    that this product was sold in the west, you
    said western region?
8
9
               Yes.
         Α.
10
         Ο.
                Western region of what?
                Our customer was United Natural
11
         Α.
12
    Foods, Inc., UNFI, and they have different
13
    regions, so we sold it just in the western
14
    region.
15
         Q.
            Of the United States?
16
         Α.
                In their western region. That may
17
    go out a little bit broader, but they had --
18
    we sold it just to that one specific region of
19
    UNFI.
20
               Can you give me an idea of what
         Q.
    that region would cover, if you know?
21
22
                Yeah, they had locations in the
23
    State of Washington, California and I know
    that they did in Colorado. I do not believe
24
25
    at the time they had Texas, which they
```

Page 18 Deposition of Howard Seiferas 1 2 currently have, so I think it may have been 3 just those areas. And do you know which stores the 4 Ο. 5 product actually appeared in? I do not know. 6 7 Can you give me an idea of the Ο. amount of product that was sold to UNFI? 8 No, I don't have a recollection of 9 how much we sold, only that the sales from our 10 11 perspective were limited. 12 Is there a typical amount of 13 product that you usually create to do one of these launches? 14 15 Α. Typically what we will do is an 16 initial production run where we run the 17 minimum that we had negotiated with our 18 co-packer. And that is what we did in this 19 case, we did have just that one production 20 run. 21 And do you recall what that Q. 22 minimum run would have been in terms of cases 23 or units? I do not. 2.4 Α. 25 Q. You testified earlier that you

```
Page 19
             Deposition of Howard Seiferas
1
    were not aware of the 2006 letter that was
2
    sent to GFA brands, correct?
3
               Correct.
4
         Α.
5
         Q.
                And you also testified earlier
6
    that you were not involved in the actual
7
    decision making role in terms of canceling the
    product; is that correct?
8
9
                That is correct.
         Α.
10
         0.
                Do you believe that the decision
    -- let me back up. Who would have been the
11
12
    decision makers in the company to make that
13
    decision?
14
               As a very small company, the owner
         Α.
15
    of the company would be -- he would listen to
16
    other people, but it would really be his sole
17
    decision if we would continue production in
18
    selling a particular item.
19
         Q.
               Would that be Mr. Harris?
20
                That is correct.
         Α.
                Do you believe it likely that Mr.
21
         Q.
22
    Harris would not have been aware of that
23
    letter at the time he made the decision to
24
    cancel this product?
25
                MR. CROSS: Objection. Lack of
```

```
Page 20
             Deposition of Howard Seiferas
1
         foundation. It calls for speculation.
2
3
                You may proceed if you can.
                Yeah, do I not know what he would
4
         Α.
5
    have known. You know, I don't have firsthand
    knowledge of that.
6
7
                You also mentioned the Earth
    Balance marking used on fruit bars. GFA also
8
    applied for the mark Fruit Balance, are you
9
    aware of that?
10
              I am not aware of that, no.
11
         Α.
12
             So based on what you just said, as
         0.
13
    far as you know, Fruit Balance was never
14
    actually used in the marketplace on a bar
15
    product?
16
         Α.
            I do know it was not used in the
17
    marketplace.
18
         Ο.
                Okay. Are you aware that the
19
    Earth Balance trademark application which
20
    covered fruit bars was expressly abandoned?
               No, I was not involved in that and
21
         Α.
22
    I had no knowledge of it.
23
                MR. SCHROEDER: Nothing further
2.4
        from me.
25
                MR. CROSS: Nothing further from
```

```
Page 21
               Deposition of Howard Seiferas
 1
 2
          me either.
 3
 4
                   (The deposition concluded at 11:15
          a.m.)
 5
 6
 7
 8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
```

Page 22 CERTIFICATE 1 2 3 I, ADRIAN J. FEBRE, a Shorthand 4 Reporter and Notary Public of the State of New 5 Jersey, do hereby certify that prior to the 6 commencement of the examination, HOWARD 7 SEIFERAS was duly sworn by me to testify the 8 truth, the whole truth and nothing but the 9 truth. 10 I DO FURTHER CERTIFY that the 11 foregoing is a true and accurate transcript of 12 the testimony as taken stenographically by and before me at the time, place and on the date 13 14 hereinbefore set forth, to the best of my ability. 15 16 I DO FURTHER CERTIFY that I am 17 neither a relative nor employee nor attorney 18 nor counsel of any of the parties to this 19 action, and that I am neither a relative nor 20 employee of such attorney or counsel, and that 2.1 I am not financially interested in this 22 action. 23 24 Notary Public of the State of 25 My commission expires June 20, 2015

	aware 12:13,21	Brian 5:12	continue 13:10 19:17
A a.m 2:10 21:5	14:21 15:2,4,6 19:2	brief 16:5	contracts 9:17
	19:22 20:10,11,18	broader 7:7 17:17	Cooper 3:6
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 1
     that I have read the foregoing transcript and that
 2
     the same and accompanying amendment sheets, if any,
     constitute a true and accurate record of my
 5
     testimony.
 6
                                            of Deponent
                                 %ignature
 8
                                   No Amendments
 9
                                  Amendments attached
10
11
           Subscribed and sworn to before me this
12
          SIXTH
                 ___ day of October
13
             Notary Public
14
             Address:
15
16
                        MAHWAH, NJ 07430
17
             My commission expires: October
18
19
             Seal:
2.0
21
22
          MARTHAJEAN DRAGO
         NOTARY PUBLIC #2413496
2.3
         STATE OF NEW JERSEY
       MY COMMISSION EXPIRES 10.13.16
24
25
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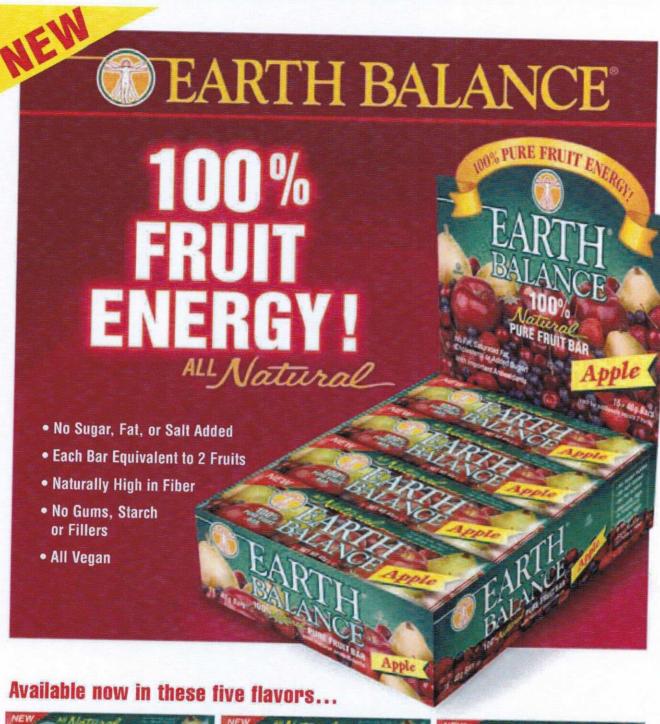
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Applicant
EXHIBIT 13
BB V GFA
No. 91212477













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Applicant 14
Exhibit 14
BB V GFA
No- alziz477

GFA / GD MEETING March 19, 2005

This document summarizes the major terms of a Joint Venture Agreement between Gorge Delights and GFA Brands and suggests next steps with an associated timetable.

TERMS OF AGREEMENT

REDACTED

Applicant Exhibit 15 BB V 6FA No. 9/212477

SUGGESTED PLAN OF ACTION

REDACTED

PRELIMINARY TIMELINE (See EXHIBIT C)